SUPREME COURT, U. S.

No. 73-858

JAN 24 1974

In the Supreme Court of the United States

ALFREDO GONZALEZ, individually and as representative of all others similarly situated,

Appellant,

vs.

MERCANTILE NATIONAL BANK OF CHICAGO, individually and as representative of all others similarly situated, and MICHAEL J. HOWLETT, Secretary of State of Illinois,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION OF APPELLEE, MERCANTILE NATIONAL BANK OF CHICAGO, TO DISMISS THE APPEAL FOR WANT OF JURISDICTION OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION.

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INDEX

TABLE OF AUTHORITIES CITED

Cases

PAGE

PAGE

Other Authorities

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Mercantile National Bank of Chicago ("the Bank"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed for want of jurisdiction, or, in the alternative, that the final judgment and decree of the District Court dismissing appellant's Amended Complaint be affirmed on the ground that the questions are so unsubstantial as not to warrant further consideration.

THE BACKGROUND OF THIS APPEAL

A. The Nature Of The Case.

This appeal is all that remains of litigation brought by four named debtor-plaintiffs, allegedly on behalf of a class, against five named creditor-defendants (also asserted to represent a class) and the Illinois Secretary of State.[1]

Three Counts of the Amended Complaint require mention. Count I, pleaded as a plaintiffs' and defendants' class action, asserted the constitutional invalidity of the "repossession" provisions of the Illinois Uniform Commercial Code (Ill. Rev. Stat., ch. 26, §§9-503, 9-504) and sought declaratory and injunctive relief against the creditor-defendants and their alleged class. That Count detailed four transactions, each between a named plaintiff and one or more named defendants, involving the financing by defendants of automobile purchases by plaintiffs and the repossession (or, in one instance, the "feared" repossession) of the automobiles. As to Mr. Gonzalez, Count I (¶¶15-23) alleged that he had executed a retail installment sales contract (subsequently assigned to the Bank) granting his seller a purchase money security interest in a 1968 Pontiac; that he was not in default under the contract; and that the Bank nevertheless repossessed the car,

[1] All named plaintiffs other than Mr. Gonzalez, and all named defendants other than the Bank and the Secretary of State, settled with each other at various times and are no longer directly involved in the litigation. Plaintiffs Mojica, Barnett, and Banks and defendants Automatic Employees Credit Union, Car Credit Corp. and Overland Bond & Investment Corp. and Wood Acceptance Corp. have so notified the Clerk of this Court. Those defendants remain in the case, if at all, only by virtue of the "defendant class" allegations of Count I.

obtained title to it, and transferred it to the original seller. (The record also showed that the original seller—not named as a defendant—in turn resold the car to a third party, also not named as a defendant, more than a month before Mr. Gonzalez or the Bank became parties to the litigation.)

Count II, pleaded as a plaintiffs' class action, asserted the constitutional invalidity of three sections of the Illinois Vehicle Code (Ill. Rev. Stat., ch. 95½, §§3-114(b), 3-116(b), 3-612) providing for issuance of repossession certificates of title by the Illinois Secretary of State and authorizing the Secretary to issue temporary "repossession" license plates. Count II sought declaratory and injunctive relief against the Secretary, and prayed that a three-judge District Court be convened under 28 U.S.C. §2281.

In Count IV, which paralleled similar Counts involving the other named parties, Mr. Gonzalez sought damages from the Bank for wrongfully repossessing his car and depriving him, "under color of State law, of rights secured to him by the Constitution of the United States."[2]

B. The State Statutes Involved.

Mr. Gonzalez challenges portions of two Codes. Sections 9-503 and 9-504 of the Uniform Commercial Code (Ill. Rev. Stat., ch. 26, §§9-503, 9-504), as they now read

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[2] Mr. Gonzalez and the Bank have stipulated that the maximum recovery on his damage claim would not exceed $750.00; the Bank has formally tendered that amount to him. Accordingly, Count IV is moot. See *Drs. Hill & Thomas Co.* v. *United States*, 392 F.2d 204 (6th Cir. 1968); *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973).

and as they stood before the 1973 amendment to one code, are set out in the Appendix.[3] Those sections in essence allow a secured party to "take possession of the collateral" upon default, proceeding without judicial process "if this can be done without breach of the peace" (§9-503), and regulate in detail the manner, form, timing, and effect of subsequent disposition of the collateral by the secured party (§9-504). Section 9-507 of the Code (Ill. Stat., ch. 26, §9-507), as it stood at the relevant times, is also set out in the Appendix. It provides injunctive and damage remedies to a debtor whose secured party violates Sections 9-503 or 9-504.

The pertinent provisions of the Illinois Vehicle Code (Ill. Rev. Stat., ch. 95½, §§3-114, 3-116, 3-612) are also set out in the Appendix. Section 3-114(b), derived from a comparable section of the Uniform Vehicle Code, requires the transferee of a vehicle which has been sold (or in which the owner's interest has been terminated) "under a security agreement" to deliver to the Secretary of State, within fifteen days, the outstanding title certificate, an application for a new certificate, and an affidavit "that .... the interest of the owner was lawfully terminated or sold pursuant to . . . the security agreement." Section 3-116(b), derived from the same source, obligates the Secretary, upon receipt of that application and all other documents "required by law," to issue the new certificate. Section 3-612 allows the Secretary to issue special license plates to persons engaged in making repossessions.

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[3] The only change in the text of the five sections of the two Codes is found in §9-504 of the Uniform Commercial Code. The new text of that which became effective July 1, 1973, is found at Appendix B. No change has been made in the remaining four, found at Appendix A, which includes earlier text of §9-504.

C. The Proceedings and Opinion Below.

After a three-judge District Court was convened as prayed in Count II of the Amended Complaint, plaintiffs moved to certify Count I as a plaintiffs' and defendants' class action. The creditor-defendants opposed certification, in part on the ground that the named plaintiffs lacked standing to obtain relief under Count I and therefore could not adequately represent a class. The Secretary also moved to dismiss Count II, in part on similar grounds.

The three-judge District Court took the motions under advisement and on August 16, 1973, dismissed the Amended Complaint. *Mojica* v. *Automatic Employees Credit Union,* 363 F.Supp. 143 (N.D. Ill. 1973). The court held:

1. Plaintiffs lacked standing to challenge the constitutionality of the Uniform Commercial Code and Vehicle Code provisions involved, because—while those provisions allow repossession only upon default, and authorize the Secretary to transfer title only upon a "lawful" transfer of ownership—the Amended Complaint alleged that no plaintiff had been in default, that each repossession was unlawful, and that each creditor-defendant had acted maliciously (363 F. Supp. at 145):

> "Thus, in a case where they assert that the repossession and resale provisions of the Illinois [Uniform Commercial] Code were used *improperly* and *maliciously* against them, plaintiffs ask this Court to determine the validity of these statutes when *properly* applied to debtors *actually in default.* We must decline. Such a context is hardly appropriate for the resolution of the constitutional issues plaintiff presents . . .".
>
> ". . . The impropriety of hypothetical determinations concerning the proper application of a statute wrong-

ly applied in the given case have led the court to uniformly decline to make decisions such as plaintiff seeks." (Emphasis by the court)

2. Plaintiffs also lacked standing to seek *any* declaratory or injunctive relief under Counts I and II. As to Mr. Gonzalez, the District Court pointed out that his automobile had been repossessed and resold, and title thereto transferred (twice), before he became a party to the action, and said (363 F. Supp. at 146):

> "Granting declaratory and injunctive relief . . ., then, would be a 'useless act.' *See* Todd v. Joint Apprenticeship Committee, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 . . . (1965), McKee & Co. v. First National Bank, 397 F.2d 248 (9th Cir. 1968), and Manion v. Holtzman, 379 F.2d 843 (7th Cir.) cert. denied, 389 U.S. 976 . . . (1967). Each of these cases held that injunctive relief would not issue where the act sought to be enjoined was completed after the suit was filed. It follows that standing to seek such relief must be lacking where the challenged event was completed before the claim was instituted."

3. Both the class and the individual aspects of the suit should therefore be dismissed—as to the class because, "[s]ince plaintiffs here lack standing themselves, they certainly cannot represent others," and as to the named plaintiffs because "we conclude that [they] . . . fail to present a claim which can be reached on the merits." 363 F.Supp. at 146.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Mr. Gonzalez (Jur. Stmt., p. 3) bases this Court's jurisdiction upon 28 U.S.C. §§1253 and 2281. Section 1253 allows direct appeal only:

> ". . . from an order *granting or denying, after notice and hearing, an interlocutory or permanent injunction* in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges.*" [Emphasis supplied.]

Section 2281 requires a three-judge court only in cases where an injunction:

> ". . . restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute"

is sought "upon the ground of the unconstitutionality of such statute."

These jurisdictional statutes, "technical in the strict sense of the term," are to be "narrowly construed;" both "important considerations of judicial administration" and the "historical purpose" of the statutes so mandate. Hence no direct appeal lies to the Court (even if the lower court was one of three judges) unless all of the statutory requisites appear. *Phillips* v. *United States,* 312 U.S. 246, 251 (1941); *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128, 129 (1965). Those requisites are lacking here, because this case did

not require a three-judge court—a matter which, even though not raised below, may be considered by this Court. *Flast* v. *Cohen,* 392 U.S. 83, 88 n.2 (1968); *United States* v. *Griffin,* 303 U.S. 226, 229 (1938).

A. Since Mr. Gonzalez Was Not Entitled To Injunctive Relief (And Since The District Court So Held On Non-Constitutional Grounds Unrelated To The Merits), Neither 28 U.S.C. §2281 Nor U.S.C. §1253 Applies Here.

A jurisdictional bar confronts Mr. Gonzalez at the outset. Explicitly holding that it was *not* reaching the merits, the District Court carefully analyzed Mr. Gonzalez' claims for injunctive relief, concluding that—since his car had been repossessed and transferred[4] (and indeed resold to still another buyer), with accompanying transfer of title, before he became a party to the suit—such relief could not be granted. *Mojica* v. *Automatic Employees Credit Union,* 363 F. Supp. 143, 144-45 (N.D. Ill. 1973).

The District Court was clearly correct. Granting injunctive relief would have been "a useless act." 1 HIGH ON INJUNCTIONS (4th Ed. 1905) §23; *Mexican Ore Co.* v. *Guadalupe Mining Co.,* 47 F. 351, 354-55 (D.N.J. 1891); *Todd* v. *Joint Apprenticeship Committee,* 332 F.2d 243, 247 (7th Cir. 1964), *cert. denied,* 380 U.S. 914 (1965); *Nicholas* v. *Tower Grove Bank,* 362 F. Supp. 374, 378 (E.D. Mo. 1973), appeal pending No. 73-1621 (8th Cir.).

The very essence of 28 U.S.C. §§1253 and 2281, however, is that they run only to grants or denials of injunctive relief on constitutional grounds, and only to decisions

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[4] The repossession title was issued June 16, 1972 (Jur. Stmt., App. E, pp. 34 a-c). The Amended Complaint making Mr. Gonzalez a party to the action was filed September 28, 1972.

on the merits. The three judge requirement is directed to determinations on the issue of constitutionality, not to decisions that for other reasons the court could not properly act. Accordingly, inability of the court to grant relief even if the constitutional claim is well founded justifies dismissal by a single judge. *Maryland Citizens For A Rep. Gen'l Assembly* v. *Governor of Md.*, 429 F.2d 606, 611 (4th Cir. 1970); *Utica Mut. Ins. Co.* v. *Vincent*, 375 F.2d 129, 134 n. 7 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967) (alternative holding). In *Barthelmes* v. *Morris*, 342 F. Supp. 153, 160-61 (D. Md. 1972), for example, the court, holding that plaintiffs' injunctive relief claims were barred by laches, refused to convene a three-judge court: ". . . the unavailability of injunctive relief goes to the substantiality of the claim and is within the province of the single district judge to determine."

In this case, like those above, the District Court held injunctive relief unavailable from the outset for reasons having nothing to do with the constitutional claims or the merits. Accordingly, its decision, whether made by three judges or not, is not appealable to this Court under 28 U.S.C. §1253.[5]

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[5] This is not the unusual case of a dispute "capable of repetition, yet evading review" such as *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). The very existence of the numerous federal court decisions dealing with the merits, cited post p. 12,—not to mention the numerous like state court decisions, including *Brown* v. *United States National Bank of Oregon*, 509 P.2d 442 (Sup. Ct. Ore. 1973), *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So. 2d 617 (Sup. Ct. Fla. 1973), and *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A. 2d 402 (1972)—so demonstrates.

B. The Naming Of The Illinois Secretary Of State As A Nominal Defendant Does Not Satisfy The Requirements of 28 U.S.C. §2281.

This action is properly brought under 28 U.S.C. §2281 only if it is one seeking to restrain the action of a state officer in "the enforcement or execution" of a state statute. The Secretary of State of Illinois is named as a party defendant in his capacity as the administrator of the Illinois Vehicle Code. However, the basic purpose of the action is to enjoin creditors from repossession of motor vehicles pursuant to §9-503 of the Illinois Uniform Commercial Code while that deprivation may still be prevented. The Secretary of State, however, has nothing whatever to do with the action of creditors in repossessing personal property. He becomes involved only when the collateral is a motor vehicle and only then at a later stage.

Even then his involvement consists only of the "mere ministerial act" of recognizing a transfer which has already taken place. *Nicholas* v. *Tower Grove Bank*, 362 F.Supp. 374, 377-78 (E.D.Mo. 1973), appeal pending No. 73-1621 (8th Cir.)[6]

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[6] The very Vehicle Code sections which Mr. Gonzalez attacks underscore this point. Ill. Rev. Stat., ch. 95½, §§ 3-114(b), 3-116(b) call for action by the Secretary only after the "interest of the owner [has been] terminated or the vehicle [has been] sold," and limit the Secretary's authority to issue a new certificate of title only to cases in which the applicant has stated under oath that the prior owner's interest was "lawfully" terminated. Even at that stage, Ill. Rev. Stat., ch. 95½, §3-114(c) carefully deprives that narrow authority of any substantive effect on the parties' rights:

> "The delivery of [the prior owner's certificate of title] pursuant to the request of the Secretary of State does not affect the rights of the person surrendering the certificate, and the action of the Secretary of State in issuing a new certificate of title as provided [in §3-114(b)] is not conclusive upon the rights of an owner or lien holder named in the original certificate."

The requirement of 28 U.S.C. §2281 that an injunction be sought to restrain the "enforcement or execution" of the challenged statute by a State officer "is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573, 579-80 (1939); *Moody* v. *Flowers*, 387 U.S. 97, 102 (1967). However, as the aforementioned decisions and statutory provisions demonstrate, the Secretary of State is only a "nominal defendant" here. He has no more to do with the validity of repossessions—even of automobiles—than, for example, a court clerk who records a foreclosure deed has to do with the constitutional propriety of the foreclosure sale, *Giordano* v. *Stubbs*, 335 F. Supp. 107, 109 (N.D. Ga. 1971), or a state banking superintendent who licenses lenders has to do with the constitutionality of wage assignments, *Bond* v. *Dentzer*, 325 F. Supp. 1343, 1348-49 (N.D.N.Y. 1971).

The weight of authority so holds. In *Nicholas* v. *Tower Grove Bank*, 362 F.Supp. 374, 377-78 (E.D. Mo. 1973), the court held the issuance of repossession titles to be a "mere ministerial act which follows, but constitutes no part of, the repossession" (adding that "the basic thrust of the complaint is that the *Bank* deprived plaintiff of her property"), inadequate to amount even to "state action" for purposes of 42 U.S.C. §1983 and 28 U.S.C. §1343. *Accord, Kirksey* v. *Theilig*, 351 F.Supp. 727, 729-32 (D. Colo. 1972). In *Gibbs* v. *Titelman*, No. 72-2165 (E.D. Pa., Nov. 21, 1972), reprinted in Appendix C, the court squarely rejected the precise argument urged by Mr. Gonzalez here, even though it found "state action" present.[7] (The only

[7] All but three of the other federal decisions reported to date have held "state action" lacking, even in automobile cases. An appeal of

contrary authority we have found, moreover, involved a statute which the court read quite differently from the Illinois statute and did not consider the issue under discussion. *Michaelson* v. *Walter Laev, Inc.*, 336 F. Supp. 296, 298 (E.D. Wis. 1972).)

We respectfully submit that *Nicholas, Kirksey* and *Gibbs* are right on this issue. They are supported not only by this Court's traditionally "constrictive view" of 28 U.S.C. §2281, *Swift & Co., Inc.* v. *Wickham*, 382 U.S. 111, 129 (1965), but also by the complete irrelevance of the Secretary to the real issues here. Even were he enjoined

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(footnote continued)

a subsequent decision in *Gibbs* v. *Titelman*, ... F. Supp. ....., 13 U.C.C. Rep. 40 (E.D. Pa. 1973) is pending as No. 74-1063 (3rd Cir.). Only two cases other than *Gibbs* and *Michaelson* have considered whether to convene a three-judge court. *Adams* v. *Egley*, 338 Supp. 614, 616-17 (S.D. Cal. 1972), rev'd on other gds., ... F.2d ....., 13 U.C.C. Rep. 161, pending on petition for rehearing en banc filed (9th Cir. Oct. Oct. 4, 1973) (state action present [the ground of reversal] but three-judge court unwarranted because no state officer sought to be enjoined); *McCormick* v. *First Nat'l Bank*, 322 F. Supp. 604, 608 (S.D. Fla. 1971) (no state action; three-judge court unwarranted because no state officer sued). The issue of a three-judge court simply did not arise in the remaining cases: *Oller* v. *Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972) (no state action); *Shelton* v. *General Electric Credit Corp.*, 359 F.Supp. 1079 (M.D. Ga. 1973) (no state action); *Greene* v. *First Nat'l Exch. Bank*, 348 F. Supp 672 (W.D. Va. 1972) (no state action); *Kirksey* v. *Theilig*, 351 F. Supp. 727 (D. Colo. 1972) (no state action); *Pease* v. *Havelock Nat'l Bank*, 351 F.Supp. 118 (D. Neb. 1972) (no state action); *Colvin* v. *Avco Fin. Services*, ... F.Supp. ....., 12 U.C.C. Rep. 25 (D. Utah 1973) (no state action); *Shirley* v. *State Nat'l Bank*, ... F.Supp. ....., 13 U.C.C. Rep. 43 (D. Conn. 1973), appeal pending No. 73-1783 (2d Cir.) (no state action); *James* v. *Pinnix*, 4 CCH Sec. Tran. ¶52,172 (S.D. Miss. 1973), appeal pending No. 73-1866 (5th Cir.) (state action); *Baker* v. *Keeble*, 362 F.Supp. 355 (M.D. Ala. 1973) (no state action); *Nicholas* v. *Tower Grove Bank*, 362 F.Supp. 374 (E.D. Mo. 1973), appeal pending No. 73-1621 (8th Cir.) (no state action); *Boland* v. *Essex Cty. Bk. & T. Co.*, 361 F.Supp. 917 (D. Mass. 1973) (state action).

from applying the challenged Vehicle Code provisions, the basic purpose of the Amended Complaint—to prevent repossessions without prior notice and hearing—would not be achieved.

II.

IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

Even if this Court concludes that Mr. Gonzalez' appeal is properly before it, the judgment of the District Court should be affirmed at this time. Its decision as to Mr. Gonzalez' standing to seek injunctive relief in support of his constitutional claim is correct (ante, p. 8). Its conclusion as to his ability to represent a class is equally correct. "A plaintiff who is unable to secure standing for himself is certainly not in a position to 'fairly ensure the adequate representation' of those alleged to be similarly situated," *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). He is in no better position to represent others whose rights may go beyond his own, *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962); *Propst* v. *Board of Educ. Lands & Funds*, 103 F.Supp. 457, 462 (D. Neb. 1951), *app. dism.*, 343 U.S. 901 (1952).

Whatever may be the case with respect to the merits of Mr. Gonzalez' constitutional claims—which the District Court did not reach, upon which no record was made,[8] and

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[8] Even had some record been made, this case—as the District Court pointed out—is hardly an appropriate one for resolution of the constitutional issue tendered. For a far more appropriate factual context, see, *e.g.*, *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972).

which are not presented by this appeal—we respectfully submit that the narrow issues upon which the District Court ruled and which are involved in this appeal do not tender questions sufficiently substantial to warrant further consideration.

CONCLUSION

For the foregoing reasons, appellee, Mercantile National Bank of Chicago, submits that this Court has no jurisdiction of this appeal. In the alternative, appellee submits that the questions presented are not substantial. Appellee therefore respectfully requests that this Court dismiss this appeal for want of jurisdiction or, in the alternative, that it affirm the judgment below for want of a substantial question.

Respectfully submitted,

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